

disability. The investigation was unable to substantiate her allegation that D.B. attempted to exclude her from the interview process. However, the investigation did substantiate her allegation that the respondents collectively denied her request for a reasonable accommodation by rejecting her request for additional time to submit her writing sample during the interview process. This determination was based on inconsistent and contradictory responses from the respondents during the investigation. The investigation also revealed that there were issues with the entire interview and selection process. Consequently, the appointing authority has agreed to re-interview all five candidates.

On appeal, D.B. indicates that after the oral interview, H.F. was provided a written question and instructed that she would have 20 minutes to draft and email her response. This time frame was chosen because this was a reasonable time for anyone at the level of Principal Examiner (the title held by all candidates) to provide a two or three paragraph response. D.B. states that when H.F. was informed about the writing assignment, she did not allude to her disability or request the need for additional time to complete the assignment. D.B. contends that he would have honored her request if she had asked. D.B. highlights that H.F. was issued a special computer monitor to accommodate her disability and he had no reason to believe H.F. would be unable to complete the assignment within the given time. D.B. states that H.F.'s oral interview was only 15 minutes long as she gave short responses and appeared very nervous. D.B. emphasizes that H.F. was actually given more than 20 minutes to complete her writing assignment. To support his claim, D.B. submits the time stamping from Microsoft Word which shows that H.F. actually spent 25 minutes editing her document. D.B. also states that H.F. spent another four minutes to email the document.

R.M. states that he is unaware of any responses that he made that were considered inconsistent and contradictory. He explains that he asked D.B. to serve on the interview panel. R.M. maintains that prior to the March 10, 2017 interview, he was unaware that H.F. had any disability as he had not been directly involved with the day-to-day operations of Employer Accounts since 2006. It was only after H.F. was informed during the interview process that all candidates would have a writing assignment did she indicate that she had vision issues. R.M. asserts that once the review committee became aware of H.F.'s vision issues, it advised her that she would receive additional time to complete the writing assignment. He highlights that he has an untarnished record for over 51 years and is troubled by the inference that the respondents colluded to deny H.F. additional time to complete the writing assignment. R.M. questions how the lack of uniformity in the scoring matrix is considered evidence that H.F. was denied additional time to complete the writing assignment.

E.S. presents that once H.F. announced that she had a vision issue, she was advised that she could take whatever time she needed. E.S. highlights that the

determination letter indicates that there were flaws and inconsistencies in the interview and selection process, but questions how these findings led to a determination that H.F. was discriminated against by being denied extra time to complete her writing assignment. E.S. indicates that she was advised by a personnel liaison that the other eligible candidates complained that this agency provided H.F. a reasonable accommodation to allow her to take the Supervisory Test Battery (STB) at a time different from the other candidates. The complaint was that H.F. did not have to take the STB at the end of the day like the other candidates and that she would have more time to take the test. E.S. represents that she responded to the liaison that H.F. had a right to request a reasonable accommodation under the Americans with Disabilities Act (ADA) and the group should just "let it go." Therefore, she finds it ironic that she is now being accused of violating the State Policy. Regarding the inconsistencies with statements made during the investigation, E.S. states that she turned over her interview notes to OD&C when H.F. filed a complaint. Several months later, she was questioned by the investigator and did not have the benefit of her interview notes to refresh her memory. Therefore, she answered all of the interviewer's questions to best of her recollection.

In response, the OD&C presents that H.F. alleged that after denying her request for additional time to complete the writing assignment, one of the respondents offered to read the question to her. The OD&C argues that D.B. contradicted himself by stating on appeal that H.F. never asked for additional time, but during the investigation when asked as to whether H.F. requested additional time, he said "She may have, and if I recall it was granted. C.R. (Administrative Assistant 2) may have gone over to her and told her that she had additional time." Further, although D.B. stated that he had no reason to believe that H.F. would have trouble completing the writing assignment within a reasonable time, the instructions for the writing assignment were provided as a hard copy using 12-point font. Therefore, the special computer monitor that was provided to her would have no impact on her ability to read the question. OD&C indicates that during the investigation, R.M. twice asserted that H.F. never asked for additional time, but was benevolently given extra time after noticing that she was having trouble reading the assignment. E.S. stated that when H.F. informed them that she had a vision problem, D.B. then advised her that she could take all the additional time that was needed. The OD&C emphasizes that E.S. stated during the investigation that she had no prior knowledge of H.F.'s disability while on appeal E.S. provides an exchange where she indicates that she was made aware of the H.F.'s disability when the personnel liaison informed her that the other candidates were complaining about H.F.'s accommodation for the STB. With respect to E.S.'s statement that she did not have her notes during the investigation, the OD&C indicates that it received a copy of E.S.'s notes from a human resources liaison and therefore either E.S. or the liaison had the original. Therefore, at minimum, E.S.

could have made a copy of her notes prior to her second interview with the investigator.

Additionally, the respondents contradicted themselves concerning who wrote the oral and written questions and how candidates were scored. Further, the appointing authority only provided documentation explaining why the two candidates were selected, but did not address why H.F. and the other candidates were not selected. The OD&C also describes several flaws that existed throughout the interview and selection process. Consequently, due to the varying accounts and contradictions among the respondents and the lack of consistency in the scoring, the OD&C found that the respondents were not credible and may have illegitimately factored in H.F.'s disability when making the decision for the promotion. On the other hand, the OD&C presents that it found H.F. was credible as she was consistent throughout the investigation. Therefore, the OD&C found it more likely than not that H.F. requested additional time to complete the writing sample and that R.M. denied the request and neither D.B. nor H.F. objected to the denial. It states that the respondents held high level positions and argues that even the perception that they engaged in discriminatory behavior compromises the equal employment process.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that employment discrimination or harassment based upon a protected category, such as disability, is prohibited and will not be tolerated.

N.J.A.C. 4A:7.3-2(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Commission has conducted a review of the record in this matter and finds that the former Commissioner's determinations that D.B., R.M. and E.S. violated the State Policy cannot be sustained. A review of the OD&C's investigation interview notes that were submitted on appeal indicates that when D.B. was asked as to whether H.F. requested additional time to complete the writing sample, he said "She may have, and if I recall it was granted. C.R. (Administrative Assistant 2) may have gone over to her and told her that she had additional time." It is noted that there is no record in the appeal file that C.R. was interviewed and she could have potentially corroborated D.B.'s statement. Moreover, earlier in his interview, D.B. was asked if he knew about H.F.'s vision problem. He responded that he did, and presumed H.F. would have said something about it at the time of the writing sample. The interviewer followed-up this response with the question, "Did she not?" D.B. replied that "I can't recall if she said something. The only thing I recall is that either [H.F.] or another interview candidate asked about the time to complete the writing sample." Further, when E.S. was asked what happened after H.F. identified that she had a vision problem, E.S. said, "[D.B.] told her to take all the

time she needed.” Moreover, R.M. stated throughout the investigation that the respondents offered H.F. additional time. Consequently, the Commission finds that the respondents were consistent in their assertions that they did provide H.F. additional time to complete the writing assignment when it was discovered that she had a vision problem.

Regarding any possible inconsistencies among the respondents’ statements that were made during the investigation and on appeal, the record indicates that the incident took place on March 10, 2017 and the complaint was filed with the OD&C on April 24, 2017. Further, D.B. was interviewed on September 28, 2017 and R.M. and E.S. were interviewed on September 27, 2017 and October 4, 2017, respectively. Additionally, E.S. indicated that she did not have nor was she provided her notes for these interviews. The appointing authority’s determination letter was issued on January 18, 2018. In other words, the respondents were interviewed more than six months after the alleged incident and five months after the complaint was filed and the determination letter was issued nearly nine months from the date of the complaint. *N.J.A.C. 4A:7-3.2(l)* provides that the appointing authority’s final letter of determination shall be issued no later than 180 days from the initial intake. This requirement is not for the administrative convenience for the appointing authority. Instead, one of the main reasons for this rule is to prevent investigations from being compromised by the passage of time as memories fades. *See In the Matter of S.J.* (CSC, decided April 9, 2014). Therefore, the Commission finds that it was not unreasonable that the respondents may not have remembered the exact details regarding the incident and any inconsistencies that were made by the respondents did not automatically mean that they were not credible.

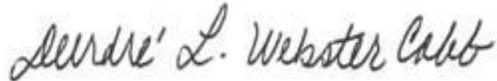
Most importantly, the one and only piece of independent and corroborating evidence that has been presented is the Microsoft Word time stamping which indicates that H.F. spent 25 minutes from the time she created the document until she last edited it. Further, she spent additional time emailing the document when completed as instructed. Therefore, although the instructions for the writing assignment indicated that she would only have 20 minutes to complete and email her response, the Commission finds that it is clear that the respondents were credible and granted H.F.’s request for a reasonable accommodation to have additional time to complete the writing assignment due to her disability as H.F. actually spent more than the time allotted for in the instructions and there is no evidence that her writing sample was disqualified or that she was in any way penalized for taking extra time. However, the Commission agrees with the investigation’s findings that the entire interview and selection process was flawed and commends the appointing authority for its agreement to re-interview the five candidates for the position.

ORDER

Therefore, it is ordered that these appeals be granted and the determination that D.B., R.M. and E.S. violated the State Policy be removed from their records.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5th DAY OF SEPTEMBER, 2018



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